IN THE

Supreme Court of the United States

No. 77-1213

October Term, 1978

RAUL LLORENTE and
ALVARO DORONZORO,

Petitioners,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT AND TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE
UNITED STATES SUPREME COURT
Term, 1978

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v.

PEOPLE OF THE STATE OF NEW YORK

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT AND TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To: The Honorable Chief Justice and the Honorable Justices of the Supreme Court of the United States

The petitioners, by Charles Sutton, their attorney, respectfully petition this Court for a Writ of Certiorari to the Appellate Division, First Department, of the Supreme Court of the State of New York and to the Court of Appeals of the State of New York.

STATEMENT PURSUANT TO U.S. SUPREME COURT RULE 23, 28 U.S.C.A.

The separate order sought to be reviewed by each petitioner respectively was made by the Supreme Court of the State of New York, Appellate Division, First Department dated and entered April 19, 1977. The official report of the memorandum decision upon which each said order was made appears at 57 A.D.2d 526. The unofficial report appears at 393 N.Y.S. 2d 575. It is appended at pp. 8a, infra. Each petitioner timely moved that court for leave to reargue the said appeal. That court denied leave to appeal, without opinion, by order dated June 16, 1977. The order was not reported. It is appended at pp. 11a, infra. Each petitioner timely applied to a Judge of the New York Court of Appeals for leave to appeal the order of the Appellate Division dated April 19, 1977 to the New York Court of Appeals. The Honorable Sol Wachtler, an Associate Judge of the New York Court of Appeals denied leave to appeal by a separate certificate as to each petitioner dated December 1, 1977, without opinion. The said certificates as to each petitioner are appended at pp. 15a and 17a infra. The said denials of leave to appeal have not been found as reported to date.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3) in that petitioners have been deprived of their constitutional rights under the Fourteenth Amendment.

QUESTIONS PRESENTED

1. Are the petitioners' constitutional rights violated when the prosecutor, on the appeal by the petitioners from their respective judgments of conviction entered supra plea bargain made in open court

and confirmed by the trial court on the record whereby each petitioner pleaded guilty to one count of his indictment to cover all of the counts of the indictment *with prejudice,* in his brief and on oral argument to that appellate court, demands and obtains an order from the Appellate Division restoring the remaining counts of the indictment for further prosecution, and further prosecutes the petitioners on those other counts, after a successful appeal by the petitioners on the one count of each indictment to which the petitioner pleaded?

2. Are the petitioners' Due Process constitutional rights violated by the breach of the plea bargain agreement by the prosecutor?

3. Is a further prosecution of the indictment against each petitioner barred by the unwithdrawn guilty plea of the petitioner which covered his entire indictment with prejudice?

4. Does a further prosecution in this case violate the petitioners' constitutional rights under the Double Jeopardy provisions of the Fourteenth Amendment?

UNITED STATES CONSTITUTION
Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sec. 220.30 Plea; plea of guilty to part of indictment; plea covering other indictments

1. A plea of guilty not embracing the entire indictment, entered pursuant to the provisions of subdivision four, five or six of section 220.10, is a "plea of guilty to part of the indictment."

2. The entry and acceptance of a plea of guilty to part of the indictment constitutes a disposition of the entire indictment.

3. (a) Except as provided in paragraph (b) a plea of guilty, whether to the entire indictment or to part of the indictment, may,with both the permission of the court and the consent of the people, be entered and accepted upon the condition that it constitutes a complete disposition of one or more other indictments against the defendant then pending. If the other indictment or indictments are pending in a different court or courts, they shall not be disposed of under this subdivision unless the other courts and the appropriate prosecutors also transmit their written permission and consent as provided in subdivision four of section 220.50; in such a case the court in which the plea is entered shall so notify the other courts which, upon such notice, shall dismiss the appropriate indictment pending therein.

(b) (i) A plea of guilty, whether to the entire indictment or to part of the indictment for any crime other than a class A felony, may not be accepted on the condition that it constitutes a complete disposition of one or more other indictments against the defendant wherein is charged a class A-I or class A-II felony as defined in article two hundred twenty of the penal law or the attempt to commit any such class A-I or class A-II felony.

(ii) Where it appears that the defendant has previously been subjected to a predicate felony conviction as defined in paragraph (b) of subdivision (1) of section 70.06 of the penal law, a plea of guilty, whether to the entire indictment or to part of the indictment, of any offense other than a felony may not be accepted on the condition that it constitutes a complete disposition of one or more other indictments against the defendant wherein is charged a felony.

(iii) A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law.

(iv) A plea of guilty, whether to the entire indictment or to part of the indictment for any crime other than a felony, may not be accepted on the condition that it constitutes a complete disposition of one or more other indictments against the defendant wherein is charged a class A felony, other than those defined in article two hundred twenty of the penal law, or a class B felony.

(v) A plea of guilty, whether to the entire indictment or to part of the indictment for any crime other than a class A-III, class B, or class C felony, may not be accepted on the condition that it constitutes a complete disposition of one or more other indictments against the defendant wherein is charged a class A-III felony.

ARTICLE 40—EXEMPTION FROM PROSECUTION BY REASON OF PREVIOUS PROSECUTION

Sec. 40.10 Previous prosecution; definitions of terms.

The following definitions are applicable to this article:

1. "Offense." An "offense" is committed whenever any conduct is performed which violates a statutory provision defining an offense; and when the same conduct or criminal transaction violates two or more such statutory provisions each such violation constitutes a separate and distinct offense. The same conduct or crimnal transaction also establishes separate and distinct offenses when, though violating only one statutory provision, it results in death, injury, loss or other consequences to two or more victims, and such result is an element of the offense as defined. In such case, as many offenses are committed as there are victims.

2. "Criminal transaction" means conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose of objective as to constitute elements or integral parts of a single criminal venture.

Sec. 40.20 Previous prosecution; when a bar to second prosecution.

1. A person may not be twice prosecuted for the same offense.

2. A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless:

(a) The offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable from those establishing the other; or

(b) Each of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil; or

(c) One of such offenses consists of criminal possession of contraband matter and the other offense is one involving the use of such contraband matter, other than a sale thereof; or

(d) One of the offenses is assault or some other offense resulting in physical injury to a person, and the other offense is one of homicide based upon the death of such person from the same physical injury, and such death occurs after a prosecution for the assault or other non-homicide offense; or

(e) Each offense involves death, injury, loss or other consequence to a different victim; or

(f) One of the offenses consists of a violation of a statutory provision of another jurisdiction, which offense has been prosecuted in such other jurisdiction and has there been terminated by a court order expressly founded upon insufficiency of evidence to establish some element of such offense which is not an element of the other offense, defined by the laws of this state.

Sec. 40.30 Previous prosecution; what constitutes

1. Except as otherwise provided in this section, a person "is prosecuted" for an offense, within the meaning of section 40.20, when he is charged therewith by an accusatory instrument filed in a court of this state or of any jurisdiction within the United States, and when the action either:

(a) Terminates in a conviction upon a plea of guilty; or

(b) Proceeds to the trial stage and a jury has been impaneled and sworn or, in the case of a trial by the court without a jury, a witness is sworn.

(2) Despite the occurrence of proceedings specified in subdivision one, a person is not deemed to have

been prosecuted for an offense, within the meaning of section 40.20, when:

(a) Such prosecution occurred in a court which lacked jurisdiction over the defendant or the offense; or

(b) Such prosecution was for a lesser offense than could have been charged under the facts of the case, and the prosecution was procured by the defendant, without the knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution for a greater offense.

3. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which restores the action to its pre-pleading status or which directs a new trial of the same accusatory instrument, the nullified proceedings do not bar further prosecution of such offense under the same accusatory instrument.

4. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which dismisses the accusatory instrument but authorizes the people to obtain a new accusatory instrument charging the same offense or an offense based upon the same conduct, the nullified proceedings do not bar further prosecution of such offense under any new accusatory instrument obtained pursuant to such court order or authorization.

Each of the petitioners was indicted by separate indictments returned at the Supreme Court of the State of New York, County of New York, Special Narcotics Parts. The petitioner Llorente was charged in a six-count indictment with one count of alleged conspiracy to possess cocaine and with five counts of possession of cocaine. The petitioner Doronzoro was charged with the same alleged conspiracy, with the same counts of possession of cocaines, and with other counts of possession and sale of cocaine. Each of the indictments charged each of the petitioners with one or more of the same charges of possession of cocaine.

In due course each petitioner moved to suppress the evidence upon which the possession counts of the indictment were based. The motions to suppress the evidence were denied as to each petitioner on the ground that neither petitioner had *standing*, since the evidence was found in an apartment at 38-25 Parsons Boulevard, Queens County, New York, which belonged to a third defendant — under a separate indictment —Alfonso Velasco, with which neither of the petitioners had any connection. Defendant Velasco made a similar motion to suppress the evidence located at two apartments, one at 41-11 Parsons Boulevard, and the other at 38-25 Parsons Boulevard, both in Queens County, New York, on the grounds of unlawful search and seizure. The trial court, after a suppression hearing which it had granted only to defendant Velasco, granted Velasco's motion to suppress the evidence found at 38-25 Parsons Boulevard and denied Velasco's motion to suppress the evidence found at 41-11 Parsons Boulevard. Thereafter, the petitioners and defendant Velasco[1] entered into a plea bargain with the prosecutor which was confirmed in open court on the record and approved and accepted by the trial court. Petitioner Doronzoro agreed to plead guilty to the count of his indictment which charged him with possession of cocaine at the Velasco apartment at 38-25 Parsons Boulevard. Petitioner Llorente agreed to plead guilty to a lesser included count of that charge, namely attempted possession, and to do so under *Alford v. North Carolina*, 401 U.S. 25 (1970).

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[1] Petitioners Llorente and Doronzoro, and defendant Velasco were represented by Charles Sutton, Esq. at the trial court and on the appeal to the Appellate Division. Velasco's judgment of conviction on his plea to a different count of his indictment, namely possession of cocaine at 41-11 Parsons Boulevard, was affirmed by the Appellate Division. He thereafter retained other counsel.

Velasco agreed to plead guilty to the count of his indictment which charged him with possession of cocaine at his apartment at 41-11 Parsons Boulevard.

The prosecutor expressly required and conditioned that all three defendants, Llorente, Doronzoro, and Velasco, must make the plea bargain, otherwise the prosecutor would not make a plea bargain with any of the three defendants. All three agreed to make the plea bargain.

The plea bargain as to each of the three defendants, Llorente, Doronzoro, and Velasco, was that each defendant would plead guilty to one specified count of his respective indictment to cover all of the counts of the indictment *with prejudice*. The agreed sentence was to be one year to life for Llorente and five years to life for Doronzoro and Velasco. The trial court agreed to accept that plea bargain. The agreement of the petitioners, defendant Velasco and the prosecutor was confirmed in open court, on the record, on September 21, 1976 and approved, on the record by the trial court.[2] It was the agreed plea bargain that prosecution of the respective indictments was terminated. See, New York Criminal Procedure Law, Section 220.30 and 40.30.

Separate judgments of conviction were thereafter rendered as to each defendant, Llorente, Doronzoro, and Velasco, on November 3, 1976. Petitioner Llorente was sentenced to a jail term of one year to life; petitioner Doronzoro and defendant Velasco were

[2] Defense counsel had informed the prosecutor that each defendant would appeal from the judgment of conviction entered on that plea. The prosecutor delayed the plea bargain process until after he had reviewed the matter with his superiors and with the Appeals Board of the District Attorney's office. After that consultation, the prosecutor confirmed the plea bargain agreement and the plea bargain agreement was formally made on the record before the trial court.

each sentenced to a jail term of five years to life. Each defendant timely appealed his judgment of conviction to the Supreme Court of the State of New York, Appellate Division, First Department.

On the appeal, the petitioners Llorente and Doronzoro in their respective briefs showed that they each had *standing* to move to suppress the admittedly illegal evidence upon which was based the count of possession of alleged cocaine at the Velasco apartment at 38-25 Parsons Boulevard, Queens County, to which each petitioner had pleaded by reason of *People v. Hansen*, 38 N.Y.2d 17. In that case, the New York Count of Appeals squarely held that a defendant has automatic *standing* to move to suppress evidence when he is criminally charged with its possession. The trial court had ruled that the evidence upon which the possession count to which each of the petitioners had pleaded, seized at 38-25 Parsons Boulevard, had been illegally seized and had granted Velasco's motion to suppress it. The prosecutor did not appeal that order of suppression and did not seriously challenge the fact that the said seizure was illegal and violated Fourth Amendment rights. After receiving petitioners' appellate briefs, the prosecutor, in the face of the apparent success of petitioners' appeals, in his brief and in his oral argument to the Appellate Division argued that in the event that the Appellate Division reverses the judgments of conviction of all or any of the three defendants, Llorente, Doronzoro, and Velasco, and dismisses the counts so pleaded, that it should allow the prosecutor to prosecute the defendants on the remaining counts of the indictment as to each defendant. Following the prosecutor's demands, the Appellate Division reversed the judgments of conviction as to each petitioner, and dismissed the count to

which he had pleaded under his respective indictment, ordered that the indictment be restored to the pre-pleading stage, *infra*, and thus fulfilled the prosecutor's demands which were in violation of the plea bargain.[3]

POINT I

The demands and arguments by the prosecutor to the Appellate Division to be allowed to continue the prosecution of the petitioners on the indictments in the event of a successful appeal by them violated their Constitutional rights under the Fourteenth Amendment.

It was the express agreement of the petitioners, and the prosecutor, which was approved and confirmed by the petitioners and the defendant Velasco to the one count of his respective indictment would cover the entire indictment *with prejudice*. Each defendant, Llorente, Doronzoro, and Velasco, changed their position by reason of that plea, suffered the judgment of conviction to be rendered, and entered upon the service of the jail sentence imposed by the judgment of conviction. The prosecutor exacted the condition that all three defendants must make the plea bargain, and they did. Defendant Velasco was not successful on his appeal to the Appellate Division and his judgment of conviction was affirmed. The prosecutor violated the plea bargain in violation of petitioners' constitutional right to due process of law. *Santobello v. New York*, 404 U.S. 257, 262-263 (1971).

[3] The prosecutor thereafter continued the prosecution of each petitioner.

Those demands by the prosecutor to the Appellate Division in the face of the apparent success of the petitioners' appeals to that court was also an expression of prosecutorial vindictiveness against the petitioners for exercising their right to appeal and violated petitioners' constitutional rights. See, *Blackledge v. Perry*, 417 U.S. 21 (1974); *North Carolina v. Pearce*, 395 U.S. 711 (1969). It is no less a violation of the plea bargain that at the instance of the prosecutor, the Appellate Division made the order restoring the indictment to a pre-pleading stage, as if no plea bargain had been made and as if there was no plea still in existence.

The violation of the plea bargain by the prosecutor by demanding that the Appellate Division order that each petitioner be subjected to further prosecution under his indictment insures that a prosecutor can effectively destroy the petitioners' plea bargain and his right to appeal, since, if the petitioner is successful on appeal, after a plea bargain, he would face further prosecution and a heavier sentence than that bargained for. See, *Blackledge v. Perry*, 417 U.S. 21 (1974).

Unless such violations are precluded, they will render plea bargaining a dangerous, if not a useless precedure, which few defendants would wisely make. The statutory right to appeal becomes illusory, and a trap to ensnare a meritorious plea bargain defendant. To allow a prosecutor to violate his plea bargain agreement would up the ante against a plea bargain defendant who would exercise his right to appeal. See, *Blackledge v. Perry*, 417 U.S. 21 (1974); *North Carolina v. Pearce*, 395 U.S. 711 (1969).

POINT II

The unwithdrawn guilty plea of each petitioner bars further prosecution of the indictment.

A plea of guilty to one count of a multiple count indictment to cover the indictment is the equivalent of an acquittal of the other counts and a plea thus made stands as a barrier to any further prosecution of the indictment. *People v. Griffin*, 7 N.Y.2d 511, 516; *People v. Romer*, 35 A.D.2d 911, 317 N.Y.S.2d 607; 38 A.D.2d 757, 329 N.Y.S.2d 719, 721 (2d Dept.) aff'd 31 N.Y.2d 919 (1972); see *Green v. United States*, 355 U.S. 184, 193 (1957). Also, *N.Y. C.P.L.* Sections 40.31, 220.30.

POINT III

Further prosecution of the indictment violates the petitioners' constitutional rights under the double jeopardy provisions under the Fourteenth Amendment.

Since the plea of guilty to one count of the indictment was made to cover all of the indictment with prejudice, under New York Criminal Procedure Law, Sections 220.30 and 40.30, the petitioners are deemed acquitted of the other counts, and thus no further prosecution may be had under the indictment without violating petitioners' constitutional rights under the double jeopardy provisions under the Fourteenth Amendment.

CONCLUSION

The petition should be granted.

The petition should be granted in order to preserve the integrity and continued value of the plea bargaining procedure. Unless the prosecutor precluded from evading and violating his promises under a plea bargain, the plea bargaining process will become a snare and a trap for defendants. Under the facts in this case, the prosecutor wins even when he loses. The petitioners, and other defendants will be forced to give up their right to appeal from the judgment of conviction even though waiver of that right was not bargained for and would not be waivable as a condition to a plea.

The prosecutor should be compelled to carry out his plea bargain promise.

Respectfully submitted,
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Dated: February 25, 1978.

ORDER OF APPELLATE DIVISION DATED APRIL 19, 1977 AS TO PETITIONER LLORENTE

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 19, 1977

Present—
Hon. Theodore R. Kupferman, Justice Presiding,
Vincent A. Lupiano,
Harold Birns,
Arthur Markewich, Justices.

The People of the State of New York,
Respondent,

-against-

Raul Llorente,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Davis, J.), rendered on November 3, 1976, convicting defendant upon his plea of guilty, of attempted possession of a controlled substance in the third degree, and said appeal having been argued by Mr. Charles Sutton of counsel for the appellant, and by Mr. Richard M. Seltzer of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby reversed, on the law, the plea vacated, defendant's motion to suppress granted as to drugs found in Apartment 2. Count 5 of the indictment against defendant dismissed, the indictment otherwise reinstated, and the matter remanded for further proceedings.

ENTER: JOSEPH J. LUCCHI,
Clerk.

ORDER OF APPELLATE DIVISION DATED APRIL 19, 1977 AS TO PETITIONER DORONZORO

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 19, 1977

Present—
Hon. Theodore R. Kupferman, Justice Presiding,
Vincent A. Lupiano,
Harold Birns,
Arthur Markewich, Justices.

The People of the State of New York,
Respondent,

-against-

Alvaro Doronzoro,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Davis, J.), rendered on November 3, 1976, convicting defendant, upon his plea of guilty, of possession of a controlled substance in the third degree, and said appeal having been argued by Mr. Charles Sutton of counsel for the appellant, and by Mr. Richard M. Seltzer of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby reversed, on the law, the plea vacated, defendant's motion to suppress granted as to drugs found in Apartment 2F, Count 20 of the indictment against defendant dismissed; the indictment otherwise reinstated, and the matter remanded for further proceeding.

ENTER: JOSEPH J. LUCCHI
Clerk.

ORDER OF APPELLATE DIVISION DATED APRIL 19, 1977 AS TO DEFENDANT VELASCO

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 19, 1977

Present—
Hon. Theodore R. Kupferman, Justice Presiding,
Vincent A. Lupiano,
Harold Birns,
Arthur Markewich, Justices.

The People of the State of New York,
Respondent,

-against-

Alfonso Velasco,
Defendant-Appellant.

Order of Affirmance on Appeal from Judgment
4492

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Davis, J.), rendered on November 3, 1976, convicting defendant, upon his plea of guilty of criminal possession of a controlled substance in the third degree, and said appeal

having been argued by Mr. Charles Sutton of counsel for the appellant, and by Mr. Richard M. Seltzer of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER: JOSEPH J. LUCCHI, *Clerk.*

Counsel for appellant is referred to
§606.5, Rules of the Appellate
Division, First Department

MEMORANDUM DECISION OF APPELLATE DIVISION DATED APRIL 19, 1977 AS TO DEFENDANT VELASCO

Kupferman, J.P., Lupiano, Birns, Markewich, JJ.
Appeal No. 4492

SUPREME COURT: STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

The People of the State of New York,
Respondent,

-against-

Alfonso Velasco,
Defendant-Appellant.

Judgment, Supreme Court, New York County (Davis, J.) rendered on November 3, 1976, unanimously affirmed. No opinion. Order filed.

MEMORANDUM DECISION OF APPELLATE DIVISION DATED APRIL 19, 1977 AS TO PETITIONERS LLORENTE AND DORONZORO

Supreme Court of the State of New York
Appellate Division: First Department

The People of the State of New York,
Respondent,

-against-

Raul Llorente,
Defendant-Appellant.

Appeal No. 4491

The People of the State of New York,
Respondent,

-against-

Alvaro Doronzoro,
Defendant-Appellant.

Appeal No. 4493

Judgments of the Supreme Court, New York County (Davis, J.) rendered November 3, 1976, following guilty pleas, unanimously reversed on the law, the pleas vacated, defendants' motions to suppress granted as to drugs found in apartment 2F, Count 5 of the indictment against Llorente and Count 20 of the indictment against Doronzoro dismissed, the indictments otherwise reinstated, and the matters remanded for further proceedings.

The defendant Velasco was arrested in connection with a drug investigation of one of two buildings at his disposal for his contraband purposes, for a

previous sale of cocaine to an undercover police officer. The officers, having read him his *Miranda* rights, took him to apartment 2F in that building and conducted a warrantless search and found large amounts of drugs and currency. The defendant Velasco claimed that none of the items belonged to him, and that he was only watching the apartment for someone else. He later agreed to cooperate and gave the information that there were additional items of contraband in the other apartment at the other building, apartment 405. While he consented to a search by signing a form, a search warrant was obtained for apartment 405 by an officer and was executed, and contraband was found in the apartment.

On a motion to suppress, it was granted (Lebittan, J.) only to the extent of the drugs found in apartment 2F where the warrantless search took place. The People now concede that search was unlawful. However, the court refused to suppress Velasco's statement to the authorities or the drugs found in apartment 405. The guilty plea by Velasco was to the criminal possession of a controlled substance in the first degree, in full satisfaction of all counts in the indictment. There was sufficient evidence of his consent to a search and his knoweldge, both in English and Spanish, of what was involved, and suppressing the evidence obtained as a result of searching apartment 2F will not deprive the plea of the essential underlying elements of guilt. However, with respect to Llorente and Doronzoro, unaccountably a plea was accepted with respect to constructive possession of the drugs found in apartment 2F. Their motion to suppress was denied (Coon, J.) on the ground that they lacked standing. We find that they did have standing, *People v. Hansen*, 38 N.Y. 2d 17, and accordingly the count to which they

pleaded, being count 5 in the Llorente indictment, and count 20 in the Doronzoro indictment, should be dismissed, and the accusatory instruments should be restored to the prepleading status, with all the counts therein contained at the time of the plea, except those ordered dismissed. CPL 440.10(7).

We have examined all of the other contentions on this appeal and find them without merit.

Orders filed.

ORDER OF APPELLATE DIVISION DATED JUNE 16, 1977 DENYING LEAVE TO APPEAL TO NEW YORK COURT OF APPEALS AS TO PETITIONERS LLORENTE AND DORONZORO

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 16, 1977.

Present—
Hon. Theodore R. Kupferman, Justice Presiding,
Vincent A. Lupiano,
Harold Birns,
Arthur Markewich, Justices.

The People of the State of New York,
Respondent,

-against-

Raul Llorente,
Defendant-Appellant.

The People of the State of New York,
Respondent,

-against-

Alvaro Doronzoro,
Defendant-Appellant.

M-1940

Each of the above-named defendants-appellants having moved for leave to reargue his appeal from a

judgment of the Supreme Court, New York County, each rendered on November 3, 1976, which judgments were unanimously reversed by separate orders of this Court, each entered on April 19, 1977,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the statement of Charles Sutton in support of said motion, and the statement of Richard M. Seltzer in opposition thereto, and after hearing Mr. Charles Sutton for the motion, and Mr. Richard M. Seltzer opposed,

It is ordered that said motion be and the same is hereby denied.

ENTER: JOSEPH J. LUCCHI, Clerk

ORDER OF APPELLATE DIVISION DATED JUNE 16, 1977 DENYING LEAVE TO APPEAL TO NEW YORK COURT OF APPEALS AS TO DEFENDANT VELASCO

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 16, 1977.

Present—
Hon. Theodore R. Kupferman, Justice Presiding,
Vincent A. Lupiano,
Harold Birns,
Arthur Markewich, Justices.

The People of the State of New York,
Respondent,

-against-

Alfonso Velasco,
Defendant-Appellant.

The above named defendant-appellant having moved for leave to reargue his appeal from a judgment of the Supreme Court, New York County, rendered on November 3, 1976, which judgment was unanimously affirmed by order of this Court entered on April 19, 1977,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the statement of

Charles Sutton in support of said motion, and the statement of Richard M. Seltzer in opposition thereto, and after hearing Mr. Charles Sutton for the motion, and Mr. Richard M. Seltzer opposed,

It is ordered that said motion be and the same is hereby denied.

ENTER: JOSEPH J. LUCCHI, Clerk.

CERTIFICATE OF HON. SOL WACHTLER, ASSOCIATE JUDGE OF NEW YORK COURT OF APPEALS DATED DECEMBER 1, 1977 DENYING PETITIONER LLORENTE'S APPLICATION FOR LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS FROM THE ORDER OF THE APPELLATE DIVISION DATED APRIL 19, 1977.

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

RAUL LLORENTE

CERTIFICATE DENYING LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

*Description of Order: Judgment of Supreme Court, New York County, November 3, 1976; reversed, on the law, plea vacated, defendant's motion to suppress granted as to drugs found in Apartment, Count 5 of indictment dismissed, indictment otherwise reinstated, and matter remanded for further proceedings to Appellate Division First Department, April 19, 1977.

Dated at Mineola, New York
December 1, 1977

s/Sol Wachtler
Associate Judge

CERTIFICATE OF HON. SOL WACHTLER, ASSOCIATE JUDGE OF THE NEW YORK COURT OF APPEALS DATED DECEMBER 1, 1977 DENYING PETITIONER DORONZORO'S APPLICATION FOR LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS FROM THE ORDER OF THE APPELLATE DIVISION DATED APRIL 19, 1977

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

against

ALVARO DORONZORO.

CERTIFICATE DENYING LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

*Description of Order: Judgment of Supreme Court, New York County, November 3, 1976; reversed, on the law, plea vacated, motion to suppress granted, Count 20 of indictment dismissed, indictment otherwise reinstated, and matter remanded for further proceeding, Appellate Division, Second Department, April 19, 1977.

Dated at Mineola, New York
December 1, 1977

s/Sol Wachtler
Associate Judge

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1213

RAUL LLORENTE, ALVARO DORONZORO,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RAUL LLORENTE, ALVARO DORONZORO,
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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Raul Llorente and Alvaro Doronzoro seek a writ of certiorari to review two orders of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, entered April 19, 1977. 57 A.D.2d 526, 393 N.Y.S.2d 575. The Appellate Division unanimously reversed two judgments of the New York State Supreme Court, New York County (DAVIS, J.), rendered November 3, 1976. On one judgment Doronzoro was convicted, upon his plea of guilty, of POSSESSION OF A CONTROLLED SUBSTANCE [Cocaine] IN THE THIRD DEGREE (New York Penal Law §220.06). By the other judgment Llorente was convicted of

ATTEMPTED POSSESSION OF A CONTROLLED SUBSTANCE [Cocaine] IN THE THIRD DEGREE (New York Penal Law §§220.06, 110.00).* By those orders the Appellate Division also vacated the defendants' respective pleas, dismissed the respective counts of the indictments to which the defendants had pleaded guilty, re-instated the remaining counts of the indictment, and remanded the cases for further proceedings by the trial court.

Jurisdiction

Doronzoro and Llorente invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1257 (3).

Constitutional Provisions and Statutes Involved

1. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> • • • nor shall any State deprive any person of life, liberty, or property, without due process of law. • • •

2. The Fifth Amendment to the United States Constitution provides in pertinent part:

> nor shall any person be subject for the same offense to be twice put in jeopardy of life of limb • • •

3. New York Criminal Procedure Law Section 220.30(1), (2), and (3)(a) provide:

> 1. A plea of guilty not embracing the entire indictment, entered pursuant to the provisions of subdivision four, five or six of section 220.10, is a "plea of guilty to part of the indictment."
>
> 2. The entry and acceptance of a plea of guilty to part of the indictment constitutes a disposition of the entire indictment.
>
> 3. (a) Except as provided in paragraph (b) a plea of guilty, whether to the entire indictment or to part of the indictment, may, with both the permission of the court and the consent of the people, be entered and accepted upon the condition that it constitutes a complete disposition of one or more other indictments against the defendant then pending. If the other indictment or indictments are pending in a different court or courts, they shall not be disposed of under this subdivision unless the other courts and the appropriate prosecutors also transmit their written permission and consent as provided in subdivision four of section 220.50; in such a case the court in which the plea is entered shall so notify the other courts which, upon such notice, shall dismiss the appropriate indictment pending therein.

4. New York Criminal Procedure Law Section 470.55(2) provides:

> Upon an appellate court order which reverses a judgment based upon a plea of guilty to an accusatory instrument or a part thereof, but which does not dismiss the entire accusatory instrument, the criminal action is, in the absence of express appellate court direction to the contrary, restored to its pre-pleading status and the accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time of the entry of the plea, except those dismissed upon appeals or upon some other post-judgment order. Where the plea of guilty was entered and accepted, pursuant to subdivision three

* Doronzoro was sentenced to a term of from five years to life imprisonment, and Llorente was sentenced to a term of from one year to life imprisonment.

of section 220.30, upon the condition that it constituted a complete disposition and dismissal not only of the accusatory instrument underlying the judgment reversed but also of one or more other accusatory instruments against the defendant then pending in the same court, the appellate court order of reversal completely restores such other accusatory instruments; and such as the case even where the order of reversal dismiss the entire accusatory instrument underlying the judgment reversed.

Statement of the Case; Prior Proceedings

On April 21, 1975, petitioner Doronzoro was charged in a twenty-one count indictment with drug sale, possession, and conspiracy charges occurring on different dates, including March 8, 1975. On April 1, 1975, petitioner Llorente was charged in a six count indictment with drug sale, possession, and conspiracy charges occurring on different dates, including March 8, 1975. A third co-defendant, Alfonso Velasco, who is not a party to this petition for certiorari, was charged on April 1, 1975 in a 16 count indictment with drug sales, possession, and conspiracy charges occurring on many different dates, including March 8, 1975.

Velasco and the two petitioners, Doronzoro and Llorente, all moved to suppress evidence seized on March 8, 1975 from two apartments, 2-F and 405, owned by Velasco. The motions of Doronzoro and Llorente were denied without a hearing on the basis that they lacked standing to contest the search. A hearing was held on Velasco's motion. His motion was granted in respect to the drugs seized from apartment 2-F and denied in respect to drugs seized from apartment 405.

On September 21, 1975 petitioners Doronzoro and Velasco pleaded guilty to the respective counts of their indictments which charged possession of drugs in apartment 2-F on March 8, 1975. These pleas, pursuant to New York Criminal Procedure Law Section 220.30 (1) and (2), were dispositions of the entire indictments. The petitioners were able, despite their guilty pleas, to appeal the denial of their motions to suppress New York Criminal Procedure Section 710.70.

On April 19, 1977 the Appellate Division of the New York State Supreme Court, First Department, held that the petitioners had standing to challenge the search of Apartment 2-F. It granted their motions to suppress. It also dismissed the counts of the respective indictments to which they had pleaded guilty, those counts charging possession of drugs in apartment 2-F on March 8, 1975. Acting under the mandate of New York Criminal Procedure Law Section 470.55(2) the Court re-instated the remaining counts of the indictments.* These counts charged possession of drugs unrelated to the illegal seizure.

The petitioners moved in the Appellate Division for re-argument on the basis that the remaining counts of the indictments should have been dismissed. Re-argument was denied on June 16, 1977. On December 1, 1977, leave to appeal to the New York Court of Appeals was denied by Judge Sol Wachtler.

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* Following re-instatement of these counts both petitioners pleaded guilty to other counts of the indictment and received the same sentences they had originally received.

POINT I

The New York State Appellate Division properly remanded petitioners' cases for reinstatement of the remaining counts of the indictments [answering petitioners' brief, Point I-III, pp. 12-15].

Petitioners were charged in separate indictments with numerous criminal acts committed on different dates. They each pleaded guilty to one count of their respective indictments. As permitted by New York State Law, the plea arrangement provided that the remaining counts of the indictments were covered by their guilty pleas. New York State Law also provided that the other counts could be reinstated if the petitioners' convictions were overturned on appeal. Petitioners' convictions were overturned on appeal and the appellate court ordered the reinstatement of the remaining counts.

Petitioners now argue that this Court should review the reinstatement of the remaining counts. Their entire present claim before this Court concerns the remedy ordered by the Appellate Division. Llorente and Doronzoro contend that the appellate court action was a result of vindictiveness by the district attorney and that prosecution of the other counts was barred by both an alleged plea bargain and double jeopardy. Petitioners' contentions concerning prosecutorial vindictiveness and a violation of the plea bargain are prematurely raised in this Court. They are wholly inappropriate for review. The only action presently before this Court is the order of the New York State Appellate Division remanding the case for reinstatement of the

remaining counts, not any action the prosecution may have subsequently taken in regard to those counts. Petitioners have also failed to create a record in state courts, either by affidavit or an evidentiary hearing, to substantiate their claim of a violated plea bargain. They rely solely on the minutes of the plea colloquy. An examination of that colloquy clearly demonstrates that there was no agreement concerning the potential reinstatement of other counts. All of petitioners' other substantive claims are without factual or legal basis.

A. Petitioners prematurely raise a claim that there was a plea bargain concerning the reinstatement of other counts if petitioners successfully appealed their convictions; as found by the state courts, there is no basis in the record to establish that such a plea bargain existed.

As noted *supra*, petitioners prematurely raise a claim that their reprosecution was barred by a plea bargain. If indeed such a bargain existed, it would be a defense to decision by the prosecution to proceed on those remanded counts, and could be raised on appeal from their convictions, if any, on those counts.* There can be no doubt, however, that the Appellate Division had the power to order the reinstatement of those counts, a procedure specifically mandated by New York Criminal Procedure Law Section 470.55 (see Subsection B, *infra*).

Moreover, upon examination, it is clear that there is no merit to petitioners' claim that there was a plea agreement

* Indeed, petitioners did plead guilty to other counts following reinstatement of the indictments. Thus, the points raised here should properly be raised on appeal from those convictions.

that the remaining counts would not be prosecuted if petitioners won appellate reversal of the counts to which they pleaded guilty. Indeed, petitioners attempt to create such a plea bargain out of thin air by repeatedly stating, in a conclusory fashion, that there was such an "express agreement." Petitioners did not submit affidavits to the state courts, or request an evidentiary hearing, to demonstrate the basis for their claims concerning the alleged plea bargain.* Rather, they rely solely on the statement of their own counsel at the plea colloquy that the pleas covered the remaining counts "with prejudice".

The state courts correctly interpreted the term "with prejudice" as an explanation that under New York Criminal Procedure Law Section 220.30(2) the plea constituted a disposition of the entire indictment. Indeed, in almost every plea bargain in New York the words "with prejudice" or "to cover" are employed to express the application of Section 220.30(2). However, another Section of the New York Criminal Procedure Law, Section 470.55, makes clear that upon appellate reversal of a guilty plea the other counts of an indictment are reinstated.

Petitioners now suggest that the prosecution waived its right to proceed in such reinstated counts. They do not reach this conclusion on the basis of a specific statement to that effect by the prosecution at the time of the plea or any other time. *Cf. Santobello* v. *New York,* 404 U.S. 257 (1971). Rather, they depend solely on the statement by

* Indeed, even such affidavits might be insufficient. *United States* v. *Mallah,* 503 F.2d 971, 988-89 (2nd Cir. 1974), *cert. denied,* 420 U.S. 995 (1975).

defense counsel at the plea that the other counts were covered "with prejudice". That statement had no bearing or relevance to the status of the other counts in the event of an appellate reversal. The state courts refused to make the absurd reading of the record urged by petitioners, and there is no basis for this Court to review those decisions.

B. The reinstatement of the remaining counts was not barred by double jeopardy.

Petitioners now argue that a plea of guilty to one count of an indictment, to cover the indictment, is the equivalent of an acquittal of the other counts and thus bars any possible prosecution of the other counts. Petitioners' Brief, Point II, p. 14. They thus argue that New York Criminal Procedure Law Section 470.55, which provides for reinstatement of such counts is unconstitutional. They cite only one case, *Green* v. *United States,* 355 U.S. 184 (1957), for this proposition. *Green* clearly has no relevance.

This Court has long held that a State may retry a defendant on a charge when the defendant has succeeded in having his first conviction on the charge set aside. The right against double jeopardy is not violated in such situations. At the defendant's request, "the original conviction has * * * been wholly nullified and the slate wiped clean." *North Carolina* v. *Pearce,* 395 U.S. 711 (1969); *see also Chaffin* v. *Stynchcombe,* 412 U.S. 17, 23-24 (1973); *Stroud* v. *United States,* 251 U.S. 15 (1919). The same principles apply where a defendant has succeeded in having his guilty plea set aside and the State seeks to prosecute on other charges that were originally covered as part of the plea agreement.

Since the only bar to the prosecution of those other charges was the plea agreement, and that agreement has been set aside at the defendants' request, the State is free to prosecute on the other counts.

In *Green* this Court held that a defendant had been placed in jeopardy on a first degree murder count when a jury remained silent on that count but convicted the defendant of second-degree murder. There had been an "implicit" acquittal and the defendant could not be retried on the first degree count. In contrast, in the instant case the petitioners were not acquitted or placed in jeopardy on the remaining counts of the indictments. Rather, as part of a plea agreement the prosecution had waived its right to proceed on those counts as long as the plea agreement remained in effect. At petitioners' urging the plea agreement did not remain in effect, and the appellate court remanded the cases for reinstatement of the remaining counts. No court has found that such action violates the principles of double jeopardy, and there is no need for this Court to review the decision below.

C. The reinstatement of the remaining counts was not a result of prosecutorial vindictiveness.

In their briefs to the Appellate Division petitioners made the same argument raised here concerning double jeopardy and an alleged plea bargain. In response we pointed out there was no agreement that the remaining counts would not be prosecuted in the event of an appellate reversal. We further cited New York statutory law which provided for the reinstatement of the remaining counts. We did not argue that the petitioners should be punished

for the undertaking of a successful appeal, but merely reminded the appellate court that a reversal would not bar reprosecution of the remaining counts.

Petitioners now argue that our action constituted the type of unconstitutional vindictiveness condemned in *Blackledge* v. *Perry*, 417 U.S. 711 (1969). This contention is without merit. First, as noted *supra*, petitioners raise this issue prematurely on this appeal. Any such unconstitutional vindictiveness by the prosecution would be a defense to convictions on the reinstated counts, not to reinstatement of the counts. Further, there was no vindictiveness whatsoever.

Blackledge concerned a situation where defendants received a greater sentence, with no apparent reason, for conviction of the same exact crime from which they had successfully appealed. Some Federal courts have considered applying this principle, in appropriate circumstances, to cases where prosecutors initiate totally new counts, which could have been brought originally, when a defendant's conviction on one count is reversed. However, the right of the prosecution to proceed on counts dismissed in light of a plea bargain has never been questioned as vindictive. Thus, the Ninth Circuit has reasoned:

> If, for example, a defendant pleaded guilty to one count and the prosecutor dismissed the others, it should be reasonably apparent that the dismissal was in consideration of the plea; if the defendant succeeded in withdrawing the plea, he should not be able to object to the prosecutor's reviving the other counts. *United States* v. *Gerard*, 491 F.2d 1300, 1306 (1974)

Indeed, although petitioners suggest the reinstatement of the other counts will make plea bargaining a "dangerous" and "useless" procedure, the Second Circuit has warned

against not permitting such reinstatement in an analogous situation:

> For us to hold that one in (the defendant's) position cannot be tried and sentenced upon the charge originally brought would encourage gamesmanship of the most offensive nature. Defendants would be rewarded for prevailing upon the prosecutor to accept a reduced charge and to recommend a lighter punishment in return for a guilty plea, when the defendant intended to attack it at some future date * * * This is nothing more than a "heads-I-win-tails-you-lose" gamble. To frustrate this strategy, prosecutors would be restrained from entering plea bargains. *United States ex rel. Williams* v. *McMann*, 436 F. 2d 103, 106-07 (2d Cir. 1970), *cert. denied*, 402 U.S. 914 (1971)*

There is no question of vindictiveness here, and petitioners have cited no precedent supporting their position. There is no basis for review by this Court.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1978

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* In *McMann*, the defendant pleaded guilty to a lesser-included count, won reversal on appeal, and then objected to his prosecution, conviction, and greater sentence on the original greater offense.

IN THE

Supreme Court of the United States

NO. 77-1213

OCTOBER TERM, 1978

RAUL LLORENTE and ALVARO DORONZORO,
Petitioners,

v.

PEOPLE OF THE STATE OF NEW YORK,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT AND TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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CASES CITED

APPELLANTS' REPLY BRIEF

STATEMENT

This reply brief is submitted in support of the petition for a writ of certiorari.

POINT I

THE RESPONDENT CONFIRMS ITS VIOLATION OF THE PLEA BARGAIN AGREEMENTS WITH PETITIONERS AND ITS POSITION THAT IT WOULD KEEP THE PLEA BARGAIN AGREEMENT ONLY IF THE PETITIONERS' APPEALS WERE UNSUCCESSFUL, BUT NOT OTHERWISE.

The respondent has not denied the petitioners' charges that after it recognized that the petitioners would succeed on their appeals (Pet. 11), it demanded in its brief and orally argued on appeal to the Appellate Division that the respective indictments be ordered reinstated for the purpose of further prosecuting the petitioners on the same indictments, notwithstanding the plea bargain agreements that there would be no further prosecution of the indictments (Pet. 11-13).

The respondent's demand to the Appellate Division to reinstate the "remaining counts" of the indictment, made in its brief and in its oral argument to that court, violated the plea bargain agreement (Pet. 9-11).

The respondent concedes that under New York Criminal Procedure Law Section 710.70(2) after their conviction upon their pleas of guilty and their sentence the petitioners had the statutory right to appeal the orders denying their pre-trial motions to suppress the evidence upon

which the count to which they entered their guilty pleas, was based (Resp. 5), to wit:

> "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction *notwithstanding the fact that such judgment is entered upon a plea of guilty.*" NYCPL 710.70(2).*

The respondent confirmed in its brief at pp. 5 and 8 that under the *joint* plea bargain agreement made by the three defendants and the prosecution and approved by the Court, each petitioner's guilty plea to the one count of the respective indictment, covered, embraced, and satisfied the whole indictment with prejudice and constituted "dispositions of the entire indictments" (Resp. 5, 8), (Pet. 10).

The respondent also confirmed that it was part of the plea bargain agreements that the respondent "wavied his right to proceed" to further prosecute the indictment and that the plea bargain agreement was a "bar to the prosecution of these other charges" (Resp. 10).

The respondent argued, however, that when the petitioners were *successful* on their appeal, that by reason of their *successful* appeal, "the plea agreement did not remain in effect" (Resp. 10), that it was "set aside" (Resp. 10), and that it left "the State . . . free to prosecute" (Resp. 10).

The argument of the respondent in this Court is that an *unsuccessful* appeal does not affect and does not "set aside" the plea bargain agreement, but that a *successful* appeal does (Resp. 10).

The respondent's argument comes to this: the prosecutor will honor and keep a plea bargain agreement, only when, and if, the plea bargain defendant gives up his statutory, and constitutionally protected, right to appeal (Resp. 6-12). That is the actual position of the respondent,

however it is phrased. What good is the right to appeal to a defendant if he is not allowed to take any benefit from that procedure, which the statute NYCPL 710.70(2) grants to him? The right to appeal must have no value to the petitioner, in so far as respondent is concerned, otherwise, if petitioner exercises his right to appeal and is successful, the respondent will not honor and will not keep the plea bargain agreement. (Pet. 12-13).

In this case, when the prosecutor recognized that the petitioners would succeed on their appeal, the prosecutor violated the plea bargain agreement and demanded that the Appellate Division reinstate the indictment for further prosecution of the petitioners (Pet. 11), which the Appellate Division thereafter directed (Pet. 9a-10a, 2a, 4a).

POINT II

THE PROVISIONS OF THE ORDER OF THE APPELLATE DIVISION DIRECTING THAT EACH PETITIONER'S PLEA BE VACATED AND REINSTATING THE INDICTMENT AFTER REVERSING THE JUDGMENT OF CONVICTION AND DISMISSING THE COUNT ON APPEAL WAS ILLEGAL, UNAUTHORIZED, AND INVALID, AND VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS.

A. The Appellate Division had no power to vacate petitioners' guilty pleas and to reinstate their indictments for further prosecution under either NYCPL 470.55(2), or NYCPL 440.10(7).

The respondent alleged in its brief at page 8 that "New York Criminal Procedure Law Section 470.55 makes clear that upon appellate reversal of a guilty plea (sic) the other counts of an indictment are reinstated." (Matter in parenthesis added). It also alleged at page 7 of

its brief that "There can be no doubt, however, that the Appellate Division had the power to order the reinstatement of those counts, a procedure specifically mandated by New York Criminal Procedure Law Section 470.55."

The Appellate Division did not have that view of New York Criminal Procedure Law Section 470.55 since the appellate court neither cited nor referred to NYCPL 470.55 as the statutory authority for its decision that "the count to which they pleaded, being count 5 in the Llorente indictment, and count 20 in the Doronzoro indictment, should be *dismissed,* and the accusatory instruments should be restored to the prepleading status with all the counts contained therein at the time of the plea, except those ordered dismissed. CPL 440.10(7)." (Pet. 9a-10a) (Emphasis Added).

That decision was followed by its order directing that the "judgment so appealed from be and the same hereby is *reversed on the law, the plea vacated, defendant's motion to suppress granted as to drugs found in Apartment 2F, Count . . . dismissed, the indictment otherwise reinstated,* and the matter remanded for further proceeding" (Pet. 2a, 4a) (Emphasis added). Since the Appellate Division did not justify its decision and order upon NYCPL 470.55, it is inappropriate for the respondent to attempt to rewrite that appellate court's decision and order to do so. It is inappropriate also for the respondent to attempt to change the ground of the Appellate Division's decision and order and to argue another ground for the decision before this Court upon the principle of estoppel. See, *Railroad v. McCarthy,* 96U.S. 258, 266-267 (1877); *People v. Roper,* 259 N.Y. 170 (1932); *People v. Sweet,* 130 Misc. 612 (1927).

NYCPL 470.55 does not empower the Appellate Division to order the vacatur of petitioners' pleas, and the restoration of the indictments to prepleading status after the appellate court reversed the judgments, granted the

motions to suppress the evidence and dismissed the counts on appeal, and thus acquitted the petitioners (Point III, infra).

NYCPL 470.55 is merely *descriptive* of the status of the accusatory instrument following a determination by an appellate court, acting pursuant to the power and authority granted to it by NYCPL 470.15 and NYCPL 470.20 to determine an appeal before it. NYCPL 470.15 grants to an appellate court the power to determine an appeal in three ways: to "affirm or reverse or modify the criminal count judgment, sentence or order." NYCPL 470.15(2). NYCPL 470.20, entitled "Determination of appeals by intermediate appellate courts; corrective action upon *reversal* or modification," grants the power to the appellate court to order "corrective action," as defined in NYCPL 470.10(3).

NYCPL 470.10(3) defines "corrective action" as meaning "affirmative action taken or directed by an appellate court upon *reversing* or modifying a judgment, sentence or order of another court, *which disposes of or continues the case in a manner consonant with the determination and principles underlying the reversal or modification.*" (Emphasis added).

The Appellate Division, in the cases at bar, *reversed* each petitioner's judgment of conviction, granted their motion to suppress the evidence, and *dismissed* the count on appeal, which count, under the plea bargain agreement, embraced and covered the indictment with prejudice against further prosecution of the indictment (Pet. 9-11). The *dismissal* was *corrective action* under NYCPL 470.20(2). *That corrective action was "consonant with the determination and principles underlying the reversal"* as set forth in NYCPL 470.10(3), which defined "corrective action." The *reason* for the reversal, as set forth in the decision of the Appellate Division was that the search and

seizure was illegal, that the petitioners had standing to move to suppress and that the lower court was in error in failing to grant the petitioners' motions to suppress the evidence (Pet. 8a-10a). The reason for the dismissal was that without the evidence, which was ordered suppressed, by the Appellate Division, there was no evidence to prove the indictments under the counts on appeal. NYCPL 470.20(2). The "corrective action" of dismissal was therefor "consonant with the determinations and principles underlying the reversal. NYCPL 470.20(2) provides that "Upon reversal of a judgment after trial for *legal insufficiency* of trial evidence, the court must dismiss the accusatory instrument" (Emphasis added). That dismissal was an acquittal of the petitioners. Point III, infra.

The Appellate Division had no authority to order that the petitioners' pleas be withdrawn and to reinstate the indictment. (Pet. 2a, 4a). NYCPL Section 470.55(2) describes the status of an indictment in the case of an "Appellate court order which reverses a judgment based upon a plea of guilty to an accusatory instrument or part thereof, *but which does not dismiss the entire accusatory instrument . . .*" In such a case, NYCPL 470.55(2) provides *automatically,* "in the absence of express appellate court direction to the contrary . . . the criminal action it . . . restored to its pre-pleading status and the accusatory instrument is deemed to contain all of the offenses which it contained and charged *at the time of the entry of the plea,* except those dismissed upon appeal or upon some other post-judgment order" (Emphasis added).

In the cases at bar, there was only one count to the indictment on appeal which embraced and covered the entire indictment, and the dismissal of that one count *was a dismissal of the indictment.* (See Point III, infra).

The provisions of NYCPL 470.55(2) confirm this construction since the *only* count in the indictment "at the

time of the entry of the plea" (NYCPL 220.50(4); NYCPL 1.20(10), 1.20(13)), was only the one count on appeal.

As set forth in Point II, infra, no New York court, on its own motion, has the power *to vacate* a defendant's plea under NYCPL 440.10(7). In the event of a reversal of a judgment based upon a guilty plea, an appellate court may nullify the proceedings by reversing the judgment and remanding the action for a new trial "of such offense." NYCPL 40.30(3). The slate there, is wiped clean. However, where the appellate court vacates the judgment by reversal, but orders a *dismissal,* rather than a new trial of the same offense, the judgment to which is reversed, NYCPL 40.30(3), the result is an *acquittal,* and the indictment terminates (Point III, infra).

B. The Appellate Division decision and order at issue is not authorized by NYCPL 440.10(7).

The assertion by the respondent that the decision and order of the Appellate Division (Pet. 10a, 2a, 4a) are authorized by NYCPL 470.55, rather than NYCPL 440.10(7), which was the statute cited and relied on by the Appellate Division, demonstrates that the respondent concedes that NYCPL 440.10(7) does *not* authorize the Appellate Division to make that decision and order, (Resp. 5, 7), and constitutes an abandonment by the respondent of any reliance upon NYCPL 400.10(7) as authority for the said decision and order of the Appellate Division.

NYCPL 440.10 entitled *"Motion* to vacate judgment," shows on its face at subdivision (1) that it can only be put into operation "upon motion *of the defendant,"* by the defendant *only,* and not by either the court, or a prosecutor, *Matter of Fernandez v. Silbowitz,* — A.D. 2d —, 398 N.Y.S.2d 896 (1st Dept. 1977); *People v. Damsky,* 47A.D.2d 822, 366 N.Y.S. 2d 13 (1st Dept. 1975); *Sekaloff v. Hogan,* 41 A.D. 2d 815, 342 N.Y.S. 2d

417 (1st Dept. 1973); *People v. Murphy,* 53 A.D. 2d 530, 384 N.Y.S. 2d 180 (1st Dept. 1976); *People v. Griffith,* 43 A.D.2d 349 N.Y.S. 2d 94 (1st Dept. 1973), and only *in the court in which the plea was entered, People v. Crimmins,* 38 N.Y.2d 407, 417, note 1, 381 N.Y.S.2d 1, 9 (1975); *People v. Wurzler,* 300 N.Y. 344 (1950); *People v. Hatzis,* 297 N.Y. 163 (1948); *People v. Wilson,* 18 A.D. 2d 424, 293 N.Y.S. 2d 900, affirmed 13 N.Y.2d 277, app. dismissed, 377 U.S. 925 (1963); *People v. Rivera,* 37 A.D. 2d 799, 324 N.Y.S.2d 731 (1st Dept. 1971). NYCPL 440.10(7) is part of and is controlled by NYCPL 440.10(1). NYCPL 440.10(7) is not a free standing provision.

POINT III

THE REVERSAL OF THE JUDGMENT AS TO EACH PETITIONER AND THE DISMISSAL OF THE ONLY COUNT ON APPEAL UNDER EACH PETITIONER'S INDICTMENT WAS AN ACQUITTAL OF EACH PETITIONER OF THAT INDICTMENT AND BARRED FURTHER PROSECUTION OF THE INDICTMENTS.

Upon the plea bargain agremeent the guilty plea by each petitioenr to the one count on appeal of this indictment, covered, embraced, and satisfied the entire indictment with prejudice against further prosecution (Pet. 10-11, 7).

The Appellate Division did not "wipe the slate clean", (See, NYCPL 40.30), but rather reversed the judgment, and dismissed the only count on appeal as to each petitioner (Pet. 10a, 2a, 4a; Resp. 2, 5). The *dismissal* was ordered as a matter of law after the appellate court ordered that the petitioners' respective motions to suppress evidence be granted (Pet. 9a-10a). The dismissal was

directed, on the ground of legal insufficiency of the evidence to prove the count on appeal and "deprived the plea of the essential underlying elements of guilt" (Pet. 9a). NYCPL 470.20(2); *People v. Marra,* 13 N.Y. 2d 18, 21-22, 241 N.Y.S. 2d 409, 412 (1963); *Matter of Kraemer v. County Court of Suffolk County,* 6 N.Y.2d 363, 367, 189 N.Y.S.2d 878, 881 (1959); *People v. Farone,* 308 N.Y.302 (1955).

The respondent has not challenged the dismissal. Indeed, the respondent conceded that the search was illegal, and thus that the dismissal was proper (Pet. 9a) (Resp. 5). The dismissal by the Appellate Division was an *acquittal* of each petitioner respectively as to each indictment, *People v. Weiner,* 211 N.Y. 469, 475 (1914); *People v. Volpe,* 20 N.Y. 2d 9, 13, 281 N.Y.S. 2d 295, 298 (1967); *People v. Patterson,* 21 A.D. 2d 356, 250 N.Y.S. 2d 715, 717, 721-722 (1st Dept. 1964); *People v. Eckerson,* 133 App. Div. 220, 117 N.Y.S. 418, 423-424 (2d Dept. 1909), and barred further prosecution of the indictment. *Green v. United States,* 355 U.S. 184 (1957).

CONCLUSION

THE DEMANDS TO THE APPELLATE DIVISION BY THE PROSECUTOR TO REINSTATE THE INDICTMENTS AGAINST PETITIONERS, IN VIOLATION OF THE PLEA BARGAIN AGREEMENT, VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS.

After the prosecutor received the petitioners' appellate court briefs and recognized that petitioners would succeed on their appeal, the prosecutor made demands to the Appellate Division in its brief and on oral argument to reinstate the indictments for further prosecution of the petitioners in violation of the plea bargain agreement that there would be no further prosecution of the indictments and violated petitioners' constitutional rights (Pet. 8-15).

Respectfully submitted,

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APPENDIX

NEW YORK STATUTES CRIMINAL PROCEDURE LAW

§1.20 Definitions of terms of general use in this chapter.

Except where different meanings are expressly specified in subsequent provisions of this chapter, the term definitions contained in section 10.00 of the penal law are applicable to this chapter, and, in addition, the following terms have the following meanings:

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10. "Plea," in addition to its ordinary meaning as prescribed in sections 220.10 and 340.20, means, where appropriate, the occasion upon which a defendant enters such a plea to an accusatory instrument.

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13. "Conviction" means the entry of a plea of guilty to, or a verdict of guilty upon, an accusatory instrument other than a felony complaint, or to one or more counts of such instrument.

14. "Sentence" means the imposition and entry of sentence upon a conviction.

15. "Judgment." A judgment is comprised of a conviction and the sentence imposed thereon and is completed by imposition and entry of the sentence.

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§220.50 Plea; entry of plea.

1. A plea to an indictment, other than one against a corporation, must be entered orally by the defendant in person; except that a plea to an indictment which does not charge a felony may, with the permission of the court, be entered by counsel upon submission by him of written

authorization of the defendant.

2. A plea to an indictment against a corporation must be entered by counsel.

3. If a defendant who is required to enter a plea to an indictment refuses to do so or remains mute, the court must enter a plea of not guilty to the indictment in his behalf.

4. Where the permission of the court and the consent of the people are a prerequisite to the entry of a plea of guilty, the court and the prosecutor must either orally on the record or in a writing filed with the indictment state their reason for granting permission or consenting, as the case may be, to entry of the plea of guilty.

§440.10 Motion to vacate judgment.

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

. . .

7. Upon an order which vacates a judgment based upon a plea of guilty to an accusatory instrument or a part thereof, but which does not dismiss the entire accusatory instrument, the criminal action is, in the absence of an express direction to the contrary, restored to its prepleading status and the accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time of the entry of the plea, except those subsequently dismissed under circumstances specified in paragraphs (b) and (c) of subdivision six. . . ."

§470.10 Determination of appeals; definitions of terms.

The following definitions are applicable to this article:

1. "Reversal" by an appellate court of a judgment,

sentence or order of another court means the vacating of such judgment, sentence or order.

2. "Modification" by an appellate court of a judgment or order of another court means the vacating of a part thereof and affirmance of the remainder.

3. "Corrective action" means affirmative action taken or directed by an appellate court upon reversing or modifying a judgment, sentence or order of another court, which disposes of or continues the case in a manner consonant with the determinations and principles underlying the reversal or modification.

§470.15 Determination of appeals by intermediate appellate courts; scope of review.

1. Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant.

2. Upon such an appeal, the intermediate appellate court ;must either affirm or reverse or modify the criminal court judgment, sentence or order. The ways in which it may modify a judgment include, but are not limited to, the following:

(a) Upon a determination that the trial evidence adduced in support of a verdict is not legally sufficient to establish the defendant's guilt of an offense of which he was convicted but is legally sufficient to establish his guilt of a lesser included offense, the court may modify the judgment by changing it to one of conviction for the lesser offense;

(b) Upon a determination that the trial evidence is not legally sufficient to establish the defendant's guilt of all the offenses of which he was convicted but is legally suffi-

cient to establish his guilt of one or more of such offenses, the court may modify the judgment by reversing it with respect to the unsupported counts and otherwise affirming it;

(c) Upon a determination that a sentence imposed upon a valid conviction is illegal or unduly harsh or severe, the court may modify the judgment by reversing it with respect to the sentence and by otherwise affirming it.

3. A reversal or a modification of a judgment, sentence or order must be based upon a determination made:

(a) Upon the law; or

(b) Upon the facts; or

(c) As a matter of discretion in the interest of justice; or

(d) Upon any two or all three of the bases specified in paragraphs (a), (b) and (c).

4. The kinds of determinations of reversal or modification deemed to be upon the law include, but are not limited to, the following:

(a) That a ruling or instruction of the court, duly protested by the defendant, as prescribed in subdivision two of section 470.05, at a trial resulting in a judgment, deprived the defendant of a fair trial;

(b) That evidence adduced at a trial resulting in a judgment was not legally sufficient to establish the defendant's guilt of an offense of which he was convicted;

(c) That a sentence was unauthorized, illegally imposed or otherwise invalid as a matter of law.

5. The kinds of determinations of reversal or modification deemed to be on the facts include, but are not limited to, a determination that a verdict of conviction resulting in a judgment was, in whole or in part, against the weight of the evidence.

6. The kinds of determinations of reversal or modification deemed to be made as a matter of discretion

in the interest of justice include but are not limited to, the following:

(a) That an error or defect occurring at a trial resulting in a judgment, which error or defect was not duly protested at trial as prescribed in subdivision two of section 470.05 so as to present a question of law, deprived the defendant of a fair trial;

(b) That a sentence, though legal, was unduly harsh or severe.

§470.20 Determination of appeals by intermediate appellate courts; corrective action upon reversal or modification.

Upon reversing or modifying a judgment, sentence or order of a criminal court, an intermediate appellate court must take or direct such corrective action as is necessary and appropriate both to rectify any injustice to the appellant resulting from the error or defect which is the subject of the reversal or modification and to protect the rights of the respondent. The particular corrective action to be taken or directed is governed in part by the following rules:

1. Upon a reversal of a judgment after trial for error or defect which resulted in prejudice to the defendant or deprived him of a fair trial, the court must, whether such reversal be on the law or as a matter of discretion in the interest of justice, order a new trial of the accusatory instrument and remit the case to the criminal court for such action.

2. Upon a reversal of a judgment after trial for legal insufficiency of trial evidence, the court must dismiss the accusatory instrument.

3. Upon a modification of a judgment after trial for legal insufficiency of trial evidence with respect to one or more but not all of the offenses of which the defenant was

convicted, the court must dismiss the count or counts of the accusatory instrument determined to be legally unsupported and must otherwise affirm the judgment. In such case, it must either reduce the total sentence to that imposed by the criminal court upon the counts with respect to which the judgment is affirmed or remit the case to the criminal court for re-sentence upon such counts; provided that nothing contained in this paragraph precludes further sentence reduction in the exercise of the appellate court's discretion pursuant to subdivision six.

4. Upon a modification of a judgment after trial which reduces a conviction of a crime to one for a lesser included offense, the court must remit the case to the criminal court with a direction that the latter sentence the defendant accordingly.

5. Upon a reversal or modification of a judgment after trial upon the ground that the verdict, either in its entirety or with respect to a particular count or counts, is against the wegith of the trial evidence, the court must dismiss the accusatory instrument or any reversed count.

6. Upon modifying a judgment or reversing a sentence as a matter of discretion in the interest of justice upon the ground that the sentence is unduly harsh or severe, the court must itself impose some legally authorized lesser sentence.

§470.55 Status of accusatory instrument upon order of new trial or restoration of action to pre-pleading status.

1. Upon a new trial of an accusatory instrument resulting from an appellate court order reversing a judgment and ordering such new trial, such accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such

trial, except (a) those upon or of which the defenant was acquitted or deemed to have been acquitted, and (b) those dismissed upon appeal or upon some other post-judgment order.

2. Upon an appellate court order which reverses a judgment based upon a plea of guilty to an accusatory instrument or a part thereof, but which does not dismiss the entire accusatory instrument, the criminal action is, in the absence of express appellate court direction to the contrary, restored to its pre-pleading status and the accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time of the entry of the plea, except those dismissed upon appeal or upon some other post-judgment order. Where the plea of guilty was entered and accepted, pursuant to subdivision three of section 220.30, upon the condition that it constituted a complete disposition and dismissal not only of the accusatory instrument underlying the judgment reversed but also of one or more other accusatory instruments against the defendant then pending in the same court, the appellate court order of reversal completely restores such other accusatory instruments; and such is the case even where the order of reversal dismissed the entire accusatory instrument underlying the judgment reversed.

§710.70 Motion to suppress evidence; orders of suppression; effects of orders and of failure to make motion.

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2. An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.